STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 97B006C

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

THOMAS DEHERRERA AND RICHARD DURKIN,

Complainants,

VS.

COLORADO DEPARTMENT OF HUMAN SERVICES, PUEBLO REGIONAL CENTER,

Respondent.

The hearing in this matter was held on December 9 and 16, 1996, in Denver before Administrative Law Judge Margot W. Jones. Respondent appeared at hearing through Toni Jo Gray, assistant attorney general. Complainants, Thomas DeHerrera and Richard Durkin, were present at the hearing and represented by Carol Iten, attorney at law.

Respondent called the following employees of the Department of Human Services, Pueblo Regional Center (PRC), to testify at hearing: Judi Hendrix; John Madrid; Bernadette Spinuzzi; Debbie Flores; and Herb Brockman. Respondent also called as witnesses at hearing the complainants.

Respondent's exhibits 1 through 5a, 8 through 11, 21, 23 through 25a, and 35 were admitted into evidence without objection. Respondent's exhibits 7 and 32 were offered into evidence, but were not admitted. Respondent's exhibits 6, 14 through 20, 31, and 33 were admitted into evidence over objection.

Complainants testified in their own behalf and called no other witnesses.

Complainants did not offer exhibits into evidence at hearing.

MATTER APPEALED

Complainants appeal their termination from employment for wilful misconduct.

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ISSUES

- 1. Whether respondent had reasonable basis to require complainants to submit to a drug test;
- 2. If not, whether complainants' refusal to submit to a drug test constituted wilful misconduct;
- 3. Whether the decision to terminate complainants' employment was arbitrary, capricious, or contrary to rule or law;
- 4. Whether either party is entitled to an award of attorney fees and costs.

PRELIMINARY MATTERS

- 1. The appeals of the two employees, Richard Durkin v. Department of Human Services, Pueblo Regional Center, State Personnel Board case number 97B007, and Tom DeHerrera v. Department of Human Services, Pueblo Regional Center, State Personnel Board case number 97B006, were consolidated under case number 97B006C.
- 2. On December 2, 1996, respondent moved to strike complainants' prehearing statement and sought attorney fees for the expense incurred to file the motion to strike. The basis of the motion to strike is that complainants' prehearing statement was signed by a business agent for the American Federation of State, County and Municipal Employees as counsel.

At hearing, complainants' counsel explained that the business agent signed the prehearing statement at her direction and in her absence in order to insure timely filing of the document. Counsel explained that a properly signed document would be submitted as substitute for the improperly signed prehearing statement.

The motion to strike and for attorney fees was denied. Respondent suffered no prejudice as a result of complainants' filing of a prehearing statement signed by a business agent. The expense incurred by respondent in filing the motion was undertaken voluntarily.

3. Complainants sought clarification regarding the policy and procedure relied upon by respondent in determining that complainants' violated PRC policy and procedure pertaining to substance abuse.

Respondent conceded that an error occurred in reference to these agency directives. The appointing authority incorrectly referenced the policy relied upon in the letter of termination. PRC policy 4.1.57 is referenced in the July 3, 1996, notice of termination of complainants' employment. It should have referred to PRC policy 4.1.57. Furthermore, prior to the hearing, complainants were provided a copy of PRC procedure 4.1.56. It was represented to complainants that this procedure was relied upon in deciding to terminate complainants' employment.

Respondent's failure to properly reference the policy and procedure relied on in requiring complainants' to submit to testing was found to be of marginal significance. A substantial body of case law has developed which controls the issue of whether reasonable suspicion for drug testing exists. And, it is this law which controls this proceeding. Further, policy 4.1.S7 and procedure 4.1.S6 are interrelated and, in relevant parts, exactly alike. The policy and procedure define the circumstances under which employees can be required to submit to drug testing.

Complainants were not deprived of due process by respondent's error. Complainants were, in fact, apprised of the basis of respondent's termination action and the policy and procedure relied upon.

- 4. Respondent's request to call complainants, jointly, as its first witness and to examine the witnesses simultaneously was denied. Respondent was also denied its request to call complainants consecutively. Respondent asked to be permitted to question the witnesses one at a time, without providing complainants' counsel an opportunity to cross examine the witnesses at the completion of each witness' direct examination.
- 5. The facts surrounding the event that gave rise to the disciplinary action in this matter involved a PRC client. Hereinafter, the client will be referred to by his initials, G.R., in order to protect the client's right to privacy.

FINDINGS OF FACT

1. Complainants Richard Durkin (Durkin) and Thomas DeHerrera (DeHerrera) were employees of PRC. Durkin was employed in June, 1996, as a developmental disabilities technician I. He was assigned to work exclusively with PRC client G.R. He had this assignment for approximately six years. DeHerrera was employed as a developmental disabilities technician aide. He had been employed by PRC for approximately seven years. Durkin and DeHerrera provided direct client care.

- 2. On June 13, 1996, DeHerrera and Durkin were scheduled to take G.R. to a doctor in Pueblo West. G.R. was temporarily housed at the Colorado Mental Health Institute at Pueblo (CMHIP) until another residential site could be established at PRC.
- 3. Durkin was extremely tired on the morning of June 13th. Durkin worked the first and third shifts on June 12, 1996. In between his shifts on June 12, 1996, he cared for his children while his wife went to work. He continued working on the first shift on June 13, 1996. On June 13, he had not slept since June 11, 1996.
- 4. DeHerrera reported to work at CMHIP at 7 a.m. to pick up a vehicle to drive G.R. to his doctor's appointment. Durkin was present at CMHIP with the client. Complainants left CMHIP with G.R. at approximately 9:00 a.m. for the doctor's appointment.
- 5. Following the doctor's appointment, until approximately lunch time, G.R., Durkin, and DeHerrera went to Mineral Palace Park where G.R. picked up trash. G.R. was then taken to Taco Bell where Durkin and DeHerrera paid for his lunch. After lunch, DeHerrera drove to a convenience store to purchase a soft drink.
- 6. The convenience store is located next door to a Pizza Hut restaurant. At approximately 12:25 p.m., as DeHerrera pulled into the convenience store parking lot, three PRC staff members and a client were exiting the Pizza Hut restaurant. The staff members were Judi Hendrix (Hendrix), a registered nurse, John Madrid (Madrid), a social worker, and Debbie Flores (Flores), a developmental disabilities technician III.
- 7. Madrid approached the van on the driver's side. He inquired of DeHerrera if he could visit with G.R. DeHerrera advised Madrid that it was not a good idea because G.R. had a bad day. Madrid neither observed nor smelled anything unusual when he spoke to DeHerrera through the open window of the van. DeHerrera exited the van and went into the convenience store.
- 8. Before Madrid could advised Flores and Hendrix that G.R. was not having a good day, Flores and Hendrix were at the van. Flores went to the rear passenger side door of the van to speak to Durkin and G.R. Durkin was seated in the second seat of the van with G.R. Durkin opened the van's side door. Flores, and the PRC client with her, stood at the open car door talking with Durkin and G.R.
- 9. Durkin told Flores that G.R. was having a very bad day. She

greeted the pair observing nothing unusual. Durkin appeared to Flores to be disheveled, as though he had just awakened. Flores did not detect the smell of drugs and she did not observed any drug paraphernalia in the van.

- 10. As Flores stood talking with Durkin at the van's side door, Hendrix leaned in the driver's side window to greet the pair. She believed that she observed a gold colored pipe on the passenger's seat which contained a hot white ash material in the bowl. She did not detect the odor of any drug in the van.
- 11. Hendrix observed that Durkin's eyes appeared glassy and bloodshot. However, Hendrix had no training in observing and detecting illegal drug use. Her knowledge in this field is limited to her education as a registered nurse and her participation in the D.A.R.E. program with her child.
- 12. Hendrix directed Durkin to return to CMHIP. Hendrix step away from the van and called Madrid to advised him of what she observed. As Madrid and Hendrix stood together in the parking lot, Durkin got out of the van. Durkin said to Hendrix, "Please don't do this. I need my job. I'm trying to do the right thing. My mother just died." Hendrix instructed Durkin to return to the car because G.R. was unattended.
- 13. Hendrix advised Madrid of her belief that she observed drugs and drug paraphernalia in the van. She asked Madrid to tell DeHerrera to return to CMHIP. Madrid spoke to DeHerrera as he exited the convenience store. Madrid instructed DeHerrera to return to CMHIP. Madrid did not tell DeHerrera that he needed to return to CMHIP immediately nor did he tell DeHerrera about Hendrix's observations in the van.
- 14. Flores, Madrid, Hendrix, and the PRC client went to CMHIP. At CMHIP, Flores was instructed to return to PRC with the client. Madrid and Hendrix waited for G.R., DeHerrera, and Durkin's arrival at CMHIP.
- 15. Shortly after Hendrix's arrival at CMHIP, she telephoned Herb Brockman (Brockman), PRC residential director, a program specialist III, and the appointing authority for complainants' positions. She reported her observations to Brockman.
- 16. Hendrix told Brockman that she observed drugs and drug paraphernalia in DeHerrera and Durkin's vehicle. Hendrix and Madrid waited at CMHIP for one hour for G.R., DeHerrera, and Durkin's arrival.

- 17. Upon their arrival, Hendrix asked DeHerrera why it took so long to return to the facility. He replied that they had to calm G.R. down before they returned. At CMHIP, G.R. was given another lunch. DeHerrera and Durkin's late return to CMHIP caused G.R. to be administered a prescribed medication late. He was scheduled to take an antibiotic at 12 noon. He was not given the medication until 2 p.m.
- 18. Brockman contacted DeHerrera and Durkin by telephone when they returned to CMHIP. He requested that they submit to a drug test. During separate telephone conversations with Brockman, they both refused. Brockman warned that refusal to take the drug test could be viewed as insubordination. They persisted in their refusal. Brockman placed the employees on administrative leave with pay effective June 13, 1996, during an investigation of the allegations of illegal drug possession and use. Brockman confirmed his direction that the employees be placed on administrative suspension in a letter dated June 14, 1996.
- 19. G.R. was tested for drugs on June 13, 1996. His test results were negative.
- 20. An R8-3-3 meeting was held with DeHerrera and Durkin on June 25, 1996. Neither Durkin nor DeHerrera admitted to drug use or possession on June 13, 1996. At the R8-3-3 meeting, Brockman offered them an opportunity to be tested for drugs, but both refused.
- 21. Brockman reviewed the information gathered in order to determine whether to impose disciplinary action. Following DeHerrera and Durkin's administrative suspension with pay, Brockman directed Diane Torres, incident investigator at PRC, to investigate and prepare a written report. Brockman reviewed this report. He also reviewed DeHerrera and Durkin's employment record. Brockman learned that both employees had good job performance ratings. Neither had received corrective or disciplinary actions during their employment with PRC.
- 22. In Durkin's case, Brockman considered the fact that in October, 1987, Durkin was employed at Wheat Ridge Regional Center where he was permitted to resign in lieu of disciplinary action. At that time, he was charge criminally with the sale of illegal drugs.
- 23. Finally, Brockman considered the fact that DeHerrera and Durkin told conflicting stories about where they went with G.R. after being instructed by Hendrix to return to CHIP. Brockman concluded that neither employee was credible in their accounts of

their whereabouts during this period. Brockman concluded that DeHerrera and Durkin should be terminated from employment for wilful misconduct and violation of PRC's policy pertaining to drug testing. The termination was effective on July 5, 1996.

DISCUSSION

Certified state employees have a protected property interest in their employment. The burden is on respondent in a disciplinary proceeding to prove by a preponderance of the evidence that the acts on which the discipline was based occurred and just cause exists for the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994); Section 24-4-105 (7), C.R.S. (1988 Repl. Vol. 10A). The board may reverse or modify the action of the appointing authority only if such action is found to have been taken arbitrarily, capriciously, or in violation of rule or law. Section 24-50-103 (6), C.R.S. (1988 Repl. Vol. 10B).

The arbitrary and capricious exercise of discretion can arise in three ways: 1) by neglecting or refusing to procure evidence; 2) by failing to give candid consideration to the evidence; and 3) by exercising discretion based on the evidence in such a way that reasonable people must reach a contrary conclusion. Van de Vegt v. Board of Commissioners, 55 P.2nd 703, 705 (Colo. 1936).

The credibility of the witnesses and the weight to be given their testimony is within the province of the administrative law judge. Charnes v. Lobato, 743 P.2d 27 (Colo. 1987). The fact finder is entitled to accept parts of a witness' testimony and reject other parts. United States v. Cueto, 628 F.2d 1273, 1275 (10th Cir. 1980). The fact finder can believe all, part, or none of a witness' testimony, even if uncontroverted. In re Marriage of Bowles, 916 P.2d 615, 617 (Colo. App. 1995).

It is the role of the administrative law judge to weigh the evidence and from the evidence reach a conclusion. The "weight of the evidence" is the relative value assigned to the credible evidence offered by a party to support a particular position. The weight of the evidence is not quantifiable in an absolute sense and is not a question of mathematics, but rather depends on its effect in inducing a belief. The standard of proof that applies in this administrative proceeding is "by a preponderance." This standard of proof has been explained as follows:

The preponderance standard requires that the prevailing factual conclusions must be based on the weight of the evidence. If the test could be quantified, the test would say that a factual conclusion must be supported by 51% of the evidence. A softer definition, however, seems more accurate; the preponderance test means that the fact finder, both the presiding officer and the administrative appeal authority, must be convinced that the factual conclusion it chooses is more likely than not.

Koch, Administrative Law and Practice, Vol. I at 491 (1985).

Respondent places significance on, and presented a substantial amount of evidence about, complainants' alleged failure to accurately report their whereabouts following Hendrix's direction to return to CMHIP with G.R. Respondent contends that complainants' testimony concerning their whereabouts after leaving the convenience store is not credible, and therefore it should be concluded that their testimony denying the presence of the drugs and drug paraphernalia in their van is also not credible.

The evidence at hearing established that complainants saw no drugs or drug paraphernalia in the van. The evidence further established that Debbie Flores and John Madrid neither observed a pipe nor smelled drugs when they came to van and spoke to its occupants. Even more important, Hendrix did not smell the odor of hash, marijuana or any other burning ember when she leaned in the driver's side window. Furthermore, Durkin testified that he appeared disheveled and red eyed on June 13, 1996, because he worked long hours from June 11 to 13, 1996.

A preponderance of the credible evidence does not support the conclusion that there was a hot hashish pipe, with ash in the bowl, in the front seat of the van. Therefore, respondent's attempts to raise question about complainants' credibility on this issue is only tangential to the pivotal issue in this case.

This case turns on the issue whether Brockman had reasonable suspicion to order complainants to take drug tests. This is determined by ascertaining whether Brockman received information about complainants' conduct from a reliable and credible source. Assuming Hendrix observed a suspicious looking pipe in the van, the issue is whether this information provided Brockman with reasonable suspicion to order complainants to take a drug test.

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ides that,

An employee will be required to submit to drug/alcohol testing, when there is reasonable suspicion to believe that an employee's use of drugs or alcohol has resulted in job impairment or is likely to jeopardize the safety of clients, staff, or property. For purposes of this procedure, reasonable suspicion is justified under the circumstances listed below.

Procedure, number 4.1.S7, defines the circumstances when reasonable suspicion is justified. It provides, in pertinent part,

Responsibility

Action

1.Supervisor/Manager Upon occasion when an employee's observed behavior

may indicate that he/she is under the influence of drugs or alcohol, or when an employee is observed using alcohol or drugs, then approval for drug/alcohol testing shall be requested from the appropriate appointing authority.

2.Supervisor/Manager Upon occasion when there is direct evidence if (sic) illegal

possession, manufacture, sale, or transfer of a controlled substance on state property or during work hours, then such incidents shall be documented and forwarded to the

appropriate appointing authority for corrective, disciplinary action.

Respondent's "Substance Abuse Policy Testing Procedures", number 4.1.S7, further provides that "[a]uthority to approve required drug testing is delegated by the Pueblo Regional Center's Director to the positions listed below: Program Manager, Team I; Program Manager, Team II; Program Manager, Team III; Program Services Director; Personnel Director."

In respondent's "Substance Abuse Policy", number 4.1.S6, use or possession of drugs on state property or during work hours is prohibited. This policy further defines reasonable suspicion to require drug testing as "suspicion of substance use based on specific, objective facts." The policy provides that PRC employees will only be tested for drugs "for cause".

PRC policy, number 4.1.S6, provides that disciplinary or corrective action may result if an employee refuses to submit to a drug test requested by a lawful authority with reasonable suspicion.

Consistent with PRC policy and procedure, reasonable suspicion to require drug testing is clearly defined by the courts. Reasonable suspicion exists when there is direct observation of drug use or information is provided by either reliable and credible sources or the information is independently corroborated. American Federation of Government Employees, AFLCIO v. Roberts, 9 F.3d 1464 (9th Cir. 1993; American Federation of Government Employee, AFLCIO, Local 2391 v. Martin, 969 F.2d 788 (9th Cir. 1992). Reasonable suspicion exist where the appointing authority is "able to articulate specific facts which, taken together with reasonable inferences from those facts, reasonably warrants the intrusion." Terry v. Ohio, 392 U.S. 1, 21 (1968).

The courts have held that criteria for finding reasonable suspicion to require drug testing includes, the following:

- direct observation of drug use or possession and/or physical symptoms of being under the influence of drugs;
- a pattern of abnormal conduct or erratic behavior;
- arrest or conviction for a drug related offense, or the identification of an employee as the focus of a criminal investigation into illegal drug possession or trafficking;
- information provided by a reliable and credible source or information independently corroborated; or
- \bullet $\,$ newly discovered evidence that the employee tampered with a previous drug test.

Local 2391 (AFGE) v. Martin, 979 F.2d 788 (9th Cir. 1992); National Employees Union v. Yeutter, 918 F.2d 968 (D.C. Cir.

1990).

Using the referenced cases, policy, and procedure as guidance, it is concluded that Brockman lacked reasonable suspicion to require complainants to submit to a drug test. Brockman did not observe the complainants on June 13, 1996. Brockman's only contact with complainants on this date was by phone when he contacted them at CMHIP to request that they submit to a drug test and to place them on administrative suspension. Brockman's next contact with complainants was at the R8-3-3 meeting. At this meeting, he had no specific information that they were under the influence drugs. Thus, his request that they submit to a drug test, lacked reasonable suspicion on this occasion also.

Respondent contends that Hendrix's observations were reliable and credible, and thus were properly relied on by Brockman. Respondent points to the fact that Hendrix is a registered nurse. Respondent contends that Hendrix was credible, having no reason to be untruthful about her observations.

However, Hendrix testified that she had no training in detecting drug usage. That fact, in combination with the fact that none of her co-workers present at the van on June 13, 1996, observed drugs or drug paraphernalia, cast significant doubt on Hendrix's reliability and credibility. In addition, Brockman made no effort to corroborate Hendrix's report on June 13, 1996.

Respondent's procedure defines a more stringent process to be followed in determining who may order an employee for drug testing. Respondent's substance abuse procedure defines five categories of personnel authorized to approve drug testing. Brockman as the PRC residential director and a program specialist III is not in a job classification defined by the procedure as having authority to order drug testing.

The evidence established that Brockman's direction on June 13, 1996, to submit to drug testing was not a lawful order because Brockman lacked authority and he lacked reasonable suspicion to issue the drug testing order. Thus, complainants' refusal to comply with the unlawful order cannot be viewed as wilful misconduct justifying termination of their employment. Jack E. Murray v. Department of Corrections, State Personnel Board case number 95B074.

Respondent had no basis for taking disciplinary action in this case. It failed to comply with its own policy and procedure because the appointing authority lacked reasonable suspicion and lacked authority to order complainants to test for drugs.

Therefore, the action from which this appeal arose is found to be groundless, entitling complainants to an award of attorney fees and costs

CONCLUSIONS OF LAW

- 1. Respondent failed to establish that it had reasonable suspicion to order complainants to take a drug test.
- 2. Complainants' refusal to submit to drug tests was not shown to be wilful misconduct.
- 3. The decision to terminate complainants' employment was arbitrary, capricious, and contrary to rule and law.
- 4. The action from which the appeal arose is groundless and complainants are entitled to an award of attorney fees and costs.

ORDER

- 1. Respondent shall reinstate complainants to their positions with PRC.
- 2. Complainants are awarded full back pay and benefits from the date of termination to the date of reinstatement, less the appropriate offset provided by law.
- 3. Complainants are awarded attorney fees and costs under section 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B).

DATED this ____ day of _____ Margot W. Jones Denver, Colorado. Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

- 1. To abide by the decision of the Administrative Law Judge ("ALJ").
- To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Req. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee

must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 ½ inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on the _____ day of January, 1997, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Carol Iten
Attorney at Law
789 Sherman St.
Denver, CO 80203

and through inter agency mail, addressed as follows:

Toni Jo Gray Assistant Attorney General 1525 Sherman St. Denver, CO 80203